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IN THE

# Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,
*Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR PERMISSION TO FILE AND BRIEF OF SCREEN COMPOSERS ASSOCIATION OF THE UNITED STATES OF AMERICA, *AMICUS CURIAE*

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## MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42 (3) of the Rules of this Court, Screen Composers Association of the United States of America (SCA) respectfully moves the Court to grant SCA permission to file a Brief Amicus Curiae herein on the following grounds:

1. SCA has requested permission of both parties herein to file a Brief Amicus Curiae in support of Respondent. Respondent has consented thereto. On February 7, 1968, Petitioner Fortnightly Corporation declined to grant such permission, stating, however, that it would not oppose the instant motion.

2. SCA is a national association of professional composers only who create copyrighted music under special assignment for filmed and taped television programs and motion picture productions. Such music constitutes by far the greatest part of music

used in television and they derive through the performing rights organizations such as ASCAP and BMI, which administer the performing rights in such music, a major source of income therefrom and for many, the principal source of income. The determination in this case will therefore, vitally affect their economic situation as composers creating music for a livelihood.

3. The contending parties before the Court are substantial commercial interests and not individual creators. The latter also have a great economic stake in the Court's determination and seek to contribute briefly to the Court the particular viewpoint of the individual music creator on the basic question of whether a compensable public performance for profit is involved in CATV transmissions.

Respectfully submitted, this 9th day of February, 1968.

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## BRIEF AMICUS CURIAE OF THE SCREEN COMPOSERS ASSOCIATION OF THE UNITED STATES OF AMERICA

### Interest of Amicus Curiae

The Screen Composers Association of the United States of America (SCA), organized about twenty-five (25) years ago is an unincorporated voluntary membership association of composers who create music under special assignment for filmed and taped television programs and motion picture productions. SCA functions for the purpose of improving the professional welfare of its members.

SCA comprises most of the leading composers of such music, approximately 150 members, who create for their livelihood most of the copyrighted music contained in television disseminations.

The performing rights held by them in such music are administered through performing rights organizations such as ASCAP and BMI. Their royalties or returns from such performing rights are a major source of income from such music, and for many the principal source of income. By far, the greater part of such income is from the television field where such music is mainly used. The determination in this case will therefore directly affect their economic situation as composers creating music for a livelihood.

## A Note as to CATV

The nature, purpose, scope and functioning of CATV Systems are amply detailed in the briefs of the contending parties and in the opinions of the Courts below. As is apparent therefrom they are huge enterprises engaged in great markets and population centers and elsewhere throughout the country in purveying entertainment through wired transmissions on a vast commercial and technological scale. Utilizing most complex instrumentation they do indeed receive, convert, amplify and propagate the electronic embodiment of the original musical, or other, rendition. If ever thought to be, they certainly are not today the relatively simple cooperative self-help ventures of the private denizens of a community.

## I

## *Buck* v. *Jewell-La Salle Realty Co.* Is Controlling on Petitioner's Public Performance Liability.

*Buck* v. *Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931), is no hoary ancient precedent out of touch with the times. Contrariwise it is this Court's modern and carefully reasoned exposition of multiple performance liability in respect of simultaneous electronic transmissions, in full awareness and cognizance of the advancing communications technologies of the Twentieth Century which have opened

new avenues for the exploitation of copyrighted works. As therefore found by the courts below, petitioner's activities with respect to the transmitted performances ultimately perceived are inescapably within the orbit of performance liability of that case.

Even were *Buck* not controlling the Solicitor General would support such copyright liability unless a license is implied in law (pp. 2-3, *Memorandum for the United States as Amicus Curiae*).

Petitioner's effort to distinguish *Buck* (supra), *Society of European State Authors & Composers, Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937) (hereinafter referred to as "SESAC"), and other transmission cases as involving reproductions or re-creations of the original rendition in perceptible form to the senses *within the defendant's own facilities* falls wide of the mark. The thrust of the cases is clearly otherwise and is not qualified by petitioner's strained and piecemeal shaping of the opinions. Nor may it be seriously argued today that the performance, perceptible to a public in the aggregate comprised of thousands of viewers in their individual private homes or quarters, is purely "private". See *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 822 (S.D.N.Y. 1926) and *SESAC* (supra).

Nor as Petitioner argues is any illegal double payment being sought here by the copyright owners. That others may pay the copyright owner with respect to their own performance, directed theoretically at least, to the same audience served in part simultaneously by CATV does not render the CATV payment for its performance a double one in fact, or illegal.

The scheme of copyright, we submit, is to afford the copyright owner, absent specific statutory restriction, a reward for the specified uses including public performance of his work, at least in all areas of profit making. This right of compensation should not be restricted or qualified

in the CATV medium because of the location or scope of operations of any CATV system whether in large cities or elsewhere. Undeniably the Petitioner would not engage in its activities without the aim of profit making. That the CATV profit making area may also contribute to the copyright owner's reward for the use of his property, can hardly mean that the copyright owner is being doubly or excessively compensated.

In the light of *Buck*, the disenfranchisement of copyright in the CATV area would be a most regressive interpretation of the Copyright Law (Title 17, U.S.C.), a statute conceived indeed to be a living branch of law adaptable to technological advances affecting the arts and not confined in its application to the particular media or processes of any given time. Since the composer members of SCA primarily rely on their performance revenue, it would be anomalous indeed, to find that the law permits those engaged in business for profit to have the right to use the creative product of these composers on a regular, continuing basis in connection with their business, without providing some compensation for the use of their property. It is only just that the law permits composers to reach new processes and businesses having a profit motive. As new communications technologies emerge, authors and composers may well suffer in that they may lose income from other older media, e.g. sheet music sales have enormously declined during the last several decades. *Hearings Before Subcommitte No. 3 of the Committee on the Judiciary of the House of Representatives,* 89th Cong., 1st Sess., ser. 8, pt. 3, at 1739 (1965).

Judge Woolsey aptly stated in the *SESAC* case:

> "This right, however, in these days when so many simultaneous public performances for profit are possible, can only be protected by continuous vigilance, and the owner of a copyright to a musical composition should have the chance to gather royalties whilst and where he may".

## II

### No License Should Be Implied in Law in Favor of CATV.

Petitioner argues for an exemption from copyright liability on the ground that communications policy and antitrust considerations require in effect, a gratuitous license to be implied in its favor as a matter of law. It conjures, otherwise, the dire situation of networks and copyright owners taking over or stangulating CATV for their own selfish purposes. It argues, moreover, that no sensible licensing procedures with copyright owners are possible, so that copyright owners must necessarily be disenfranchised for CATV operational purposes.

We fail to see any manifest congressional purpose implemented through the Federal Communications Commission or otherwise which requires an abnegation of performing rights in favor of CATV interests. It seems to us that the Copyright Act stands clearly for the reverse proposition. Judicial limitation of statutory performance rights cannot here be justified through dire prophecies of control and strangulation. It would be indeed strange to assume that the suppliers of copyrighted music for CATV transmission would not, in the regular course, or with the aid or direction of the courts if necessary, arrive at workable and satisfactory licensing arrangements with their new customer, CATV, as they have with older customers such as the broadcasters. Any anti-competitive results, should they develop, would require, as in the normal judicial course, the consideration of the courts on a case-by-case examination in other proceedings. This Court need only decide the instant case and should not be obliged in so doing to lay down what is in effect, anticipatory legislative guidelines on a subject which is presently receiving consideration in great depth from Congress.

## Conclusion

We submit that in an age when modern media are, as a result of their scope and rapidity of dissemination, sapping and devouring more and more the creative genius which sustains them, the constitutionally sanctioned reward of the creators—copyright—should not be restricted for the benefit of a profit making industry such as CATV.

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